

**Before the  
Federal Trade Commission  
Office of the Secretary  
Room H-159 (Annex K)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580**

In the Matter of	)	
	)	
Telemarketing Sales Rule	)	RIN 3084-0098
Abandonment	)	
	)	
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**COMMENTS OF INFOCISION MANAGEMENT CORPORATION, INC., ON THE  
PROPOSED REVISION TO THE TELEMARKETING SALES RULE REGARDING  
CALL ABANDONMENT**

Infocision Management Corporation, Inc., (“IMC”) supports all efforts by the Federal Trade Commission (“FTC”) to harmonize its regulation of telemarketing with the regulations implemented by the Federal Communications Commission (“FCC”).

Because there is no evidence that telemarketers have attempted to manipulate abandonment rates, IMC supports the DMA’s proposal for the FTC to adopt the 30 day measurement period for abandonment. This period will allow businesses necessary time to both diagnose and correct errors, and not subject businesses to damages for temporary malfunctions.

IMC also supports the FTC’s proposal to explicitly confirm that recorded calls are permissible in some circumstances. Congress has allocated responsibility to regulate recorded calls explicitly to the FCC, see 47 U.S.C. § 227(b)(2)(B), and the FTC does not have authority to ban recorded calls by classifying them as “abandoned.” Recorded calls placed to established customers of businesses with proper disclosures cause none of the harms which the abandonment provisions were designed to correct<sup>1</sup>, and the FTC should not try to indirectly regulate what has been allocated by Congress to the FCC’s jurisdiction. The FCC has implemented an abandonment provision for recorded calls to alleviate the designated harms caused by abandoned calls, 47 C.F.R. § 64.1200(a)(6)(i), and the FTC should adopt that same standard rather than a more restrictive standard for which it has no jurisdiction.

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<sup>1</sup> 68 Federal Register 4580, 4642 (Jan. 29, 2003).

## **I. INTRODUCTION TO INFOCISION**

IMC's goal is to provide commercial marketing clients with the highest quality inbound teleservices, outbound teleservices and e-services.

IMC raises more money for nonprofit organizations than any other telephone marketing company in the world. We also have an unmatched reputation for quality, integrity and customer service. The mission of IMC is to be the highest quality teleservices provider of the 21<sup>st</sup> Century as well as a model corporate citizen. IMC has filed comments regarding every stage of revision of the TSR and TCPA regulations. IMC would welcome the opportunity to provide the Commission any additional information relevant to these comments and its experience with legal compliance.

## **II. COMMENTS**

### **A. RESPONSE TO QUESTIONS FOR COMMENT**

#### **General Questions For Comment**

Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on (a) the proposed safe harbor to allow telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship, and (b) DMA's request to substitute a "per 30-day period" for the current "per day per campaign" method of measuring the maximum allowable rate of call **abandonment** under the existing safe harbor in 16 C.F.R. § 310.4(b)(4)(i). Please include answers to the following questions:

#### **1. What is the effect (including any benefits and costs), if any, on consumers?**

There has never been any evidence advanced that business will abuse the 30 day measurement period to "target call abandonments at certain less valued groups of consumers, resulting in their receipt of more than their share of abandoned calls." 69 Fed. Reg. 67287, 67291 (Nov. 17, 2004).

It is improper for the FTC to speculate and presume adverse consequences when no basis for same exists. Consumers, regulators and businesses are better served by a uniform scheme of federal regulation<sup>2</sup>. The FTC should adopt the 30 day measurement standard.

#### **2. What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?**

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<sup>2</sup> Do-Not-Call Implementation Act of 2003, Public Law 108-10 (See Memorandum of Understanding attached hereto as Exhibit "A").

Adopting the thirty day standard would save IMC substantial amounts of time and resources at no cost to compliance or consumers. Uniformity results in reduced costs for compliance monitoring that is ultimately shared with the consumer.

**3. What is the impact (including any benefits and costs), if any, on industry, including those who may be affected by these proposals but not obligated to comply with the Rule?**

IMC believes that cost savings would be industry-wide for compliant companies.

**4. What changes, if any, should be made to the proposed Rule to minimize any cost to industry, individual firms that must comply with the Rule, or consumers?**

The Commission should revise § 310.4(b)(4)(i) to change the phrase “measured per day per calling campaign” to “measured over a 30-day period per calling campaign.”

#### **Questions on Proposed Specific Provisions**

In response to each of the following questions, please provide:

(1) Detailed comment, including data, statistics, consumer complaint information, and other evidence, regarding the issue referred to in the question; (2) comment as to whether the proposed changes do or do not provide an adequate solution to the problems they were intended to address, and why; and (3) suggestions for additional changes that might better maximize consumer protections or minimize the burden on industry.

**1. Are “hang-up” calls and “dead air”--the two harms that prompted adoption of the current call abandonment provisions--likely to arise from telemarketing calls that deliver a prerecorded message to consumers with whom the seller has an established business relationship? Are there other consumer harms that may result from such calls, and if so, what are they? Could the proposed safe harbor be crafted to eliminate such harms, and if so, how? If not, why not?**

No. The proposed change recognizes that recorded calls do not create the same harms caused by call abandonment and are welcomed by consumers in certain circumstances. The FTC has no authority to indirectly ban all recorded calls as Congress has designated authority to regulate this medium to the FCC.

The FTC does not have authority to require a forced-speech disclosure in all recorded calls, and the requirement that this disclosure be made at the beginning of all recorded calls is unconstitutional.

**5. How much, if any, “dead air” should be permitted between the completion of the answering consumer's greeting and the beginning of the**

**prerecorded message in the proposed new call abandonment safe harbor for telemarketing calls delivering a prerecorded message to consumers with whom the seller has an established business relationship? Because using prerecorded messages obviates the need to wait for an available live sales representative, is there any reason that the prerecorded message could not start less than two seconds after completion of the answering consumer's greeting? What would be the costs and benefits of starting the prerecorded message less than two seconds after completion of the answering consumer's greeting?**

The FTC should adopt the FCC's standard of 2 seconds.

**6. What would be the costs to industry of requiring that each prerecorded message include a mechanism that would enable the consumer receiving the call to assert a Do Not Call request during the call, for example, by pressing a number on the keypad, or by stating aloud the wish not to receive future calls? Specifically, what would be the incremental expense of such a requirement? What would be the overall costs and benefits to consumers of such a requirement? What would be the comparative costs and benefits to industry and consumers of providing a toll-free number in a prerecorded message that call recipients could call to assert a Do Not Call request? Are there other alternative means of preserving the consumer's ability to assert a Do Not Call request that would strike a better balance of costs and benefits than requiring an opportunity during the prerecorded message to assert a Do Not Call request?**

The FTC does not have authority to make this requirement and should harmonize its proposal with the existing regulatory scheme of the FCC as directed by Congress in the Do-Not-Call List Implementation Act of 2003. See Exhibit A.

**9. Would the proposed new safe harbor in § 310.4(b)(5) complicate enforcement efforts against a seller or telemarketer who violates the TSR and claims falsely that it has an established business relationship with called consumers?**

No. Businesses are required to keep records regarding established business relationships and produce same if necessary to support a claim that the relationship exists. False claims of established business relationship are otherwise illegal.

**10. Is it appropriate that the proposed new safe harbor in § 310.4(b)(5) specifies that the seller or telemarketer must allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call? If not, is there some other more appropriate element that should be included in the safe harbor to preclude the problem of premature "hang-ups" before consumers can reach the telephone?**

This is appropriate and harmonizes with FCC regulations.

**12. Is the burden on telemarketers in meeting the three percent maximum abandoned call level per day per telemarketing campaign outweighed by benefits to consumers in having call abandonment distributed evenly at a uniformly low level to all called consumers? What, if any, characteristics of the telemarketing equipment currently in use might make compliance with the "per day per campaign" standard problematic? What, if any, costs would result from having the equipment adjusted or replaced to eliminate problems?**

Some items outside of the control of a business can cause abandonment. A 30 day standard would enable businesses to take account of these factors and achieve compliance with no cost to consumers. There is no evidence that any business has ever targeted low value consumers to manipulate abandonment rates. Aberrations can be compensated for in the 30 day measuring period.

**13. According to DMA, "marketers who use predictive dialing technology are having difficulty configuring their software to comply with the FTC's per day, per calling campaign 3% [maximum abandoned call] standard." Is this statement accurate? If so, why? And if so, how widespread is this difficulty? If this statement is not accurate, why not? Were similar problems encountered in meeting the DMA's former guideline of no more than five percent of calls abandoned per day per telemarketing campaign? Why or why not?**

Operating on a per-day, per-calling campaign standard makes it virtually impossible to operate efficiently. On a daily basis, campaigns must be shut down and managed in a manual mode to ensure compliance with this overly burdensome requirement. Efficiency is destroyed and the resulting increase in costs has made many programs no longer cost-effective.

**14. If the three percent maximum call abandonment rate were measured over a 30-day period, instead of per day per telemarketing campaign, what effect, if any, would this change have on actual call abandonment rates? What would prevent a telemarketer from targeting call abandonments at certain less valued groups of consumers, resulting in their receipt of more than their share of abandoned calls? What would prevent setting predictive dialers to abandon calls at a higher rate to one subset of the population and a lower rate to another subset of the population? Is it appropriate that some segments of the population should be subjected to a higher rate of call abandonment than other segments of the population? If so, why?**

Measuring abandonment rates on a monthly basis will allow the computer systems to function as they were intended without having to shut down programs and run in a manual environment.

**15. Can telemarketing equipment be programmed to dynamically maintain a steady level of no more than three percent call abandonment for all calls being placed? What, specifically, is the equipment that has that capacity to be programmed in such a manner, if any? What are the costs associated with this equipment?**

Yes, the technology allows controls to be placed on the algorithms determining the speed at which the system dials. It is possible to maintain a steady level but it is not an exact science. There are too many variables constantly changing.

**B. THE COMMISSION SHOULD CHANGE ITS PROPOSAL TO HARMONIZE THE TSR WITH FCC REGULATIONS AS DIRECTED BY CONGRESS**

The Commission should revise the proposal to adopt the 30 day measurement period for abandoned calls. The Commission should also revise proposed § 310.4(b)(5)(ii)(A) to harmonize with the FCC's restriction requiring a telephone number prior to the end of the call to which the consumer can make a do-not-call request. Thus the words "... at the outset of the message, with only the prompt disclosures required by § 310.4(d) or (e) preceding such opportunity..." should be deleted from the proposed rule.

The Commission should also revise § 310.4(b)(4)(i) to change the phrase "measured per day per calling campaign" to "measured over a 30-day period per calling campaign."

**III. CONCLUSION**

The Commission should attempt to harmonize its restrictions with those of the FCC to best serve the interests of consumers and businesses. Uniformity of regulation results in reduced costs to the industry that are shared with the consumer public.

IMC would welcome the opportunity to provide any additional information the FCC requests regarding these comments.